

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of)	RM-10586
Fixed and Mobile Broadband Access, Educational)	
and Other Advanced Services in the 2150-2162)	
and 2500-2690 MHz Bands)	
)	
Part 1 of the Commission's Rules - Further)	WT Docket No. 03-67
Competitive Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service and the Instructional)	
Television Fixed Service to Engage in Fixed Two-)	
Way Transmissions)	
)	
Amendment of Parts 21 and 74 of the)	WT Docket No. 02-68
Commission's Rules With Regard to Licensing in)	RM-9718
the Multipoint Distribution Service and in the)	
Instructional Television Fixed Service for the Gulf)	
of Mexico)	

**REPLY TO CONSOLIDATED OPPOSITION
TO PETITIONS FOR RECONSIDERATION**

WHTV Broadcasting Corp. d/b/a Digital TV One ("Digital TV One") hereby replies to the Consolidated Opposition to Petitions for Reconsideration filed by the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED") on February 22, 2005 (the "IMWED Opposition"). As will be discussed below, the IMWED Opposition fails to address the substantial equities and public interest justifications supporting the proposals of W.A.T.C.H. TV Company ("WATCH") and the Wireless Communications Association International, Inc. ("WCAI") to permit those multichannel video programming distributors ("MVPDs") that were transmitting digital video programming on more than seven Broadband Radio Service ("BRS") and Educational

Broadband Service ("EBS") channels as of October 7, 2002 to automatically opt-out of the 2.5 GHz band transition process.¹

Digital TV One is a pioneer in the provision of multichannel video services over BRS/EBS spectrum. After years of operating its MVPD system utilizing analog technology, in 1999 Digital TV One invested millions of dollars in the construction of a digital video service that today continues to serve the public in and around San Juan, PR. Digital TV One currently provides its digital multichannel video service utilizing ten 6 MHz wide EBS and BRS channels in San Juan. Digital TV One is also currently testing a wireless broadband data service and anticipates launching that service as an adjunct to its MVPD offering in the very near future. Competition in the MVPD marketplace is fierce, and the presence of Digital TV One in the marketplace has a positive impact on reducing the rates and improving service to all MVPD consumers in the area. Moreover, Digital TV One provides service in communities that other MVPDs have chosen to ignore due to the socio-economic class of its residents. If Digital TV One were forced to cease providing its high-powered digital video service in these communities due to a transition to a new band plan that cannot accommodate its entire digital video system, the underserved population in these communities would no longer have a viable option for service.

¹ See Petition of W.A.T.C.H. TV Company for Reconsideration, WT Docket No. 03-66, at 2-10 (filed Jan. 10, 2005) ["WATCH Petition"]; Petition of the Wireless Communications Ass'n Int'l, Inc. for Partial Reconsideration, WT Docket No. 03-66, at 26 (corrected version filed Jan. 18, 2005) ["WCAI Petition"].

In its earlier filings in this proceeding, Digital TV One expressed its steadfast support for the proposal originally advanced by WCAI, the National ITFS Association, and Catholic Television Network (collectively, the “Coalition”) to permit BRS/EBS MVPDs that were using more than seven 2.5 GHz band channels for the transmission of digitally compressed video programming to subscribers as of October 7, 2002 to automatically opt-out of the transition process.² As such, Digital TV One was disappointed that the *Report and Order* in this proceeding refused to grant the requested relief, notwithstanding the Commission’s acknowledgement that “[w]e are also sympathetic to those BRS licensees that have a viable business for high-powered operations, but who need more than seven digitized MBS channels to deliver service to their customers, which would constitute all of the high-power spectrum in the 2.5 GHz band.”³

Thus, Digital TV One now supports the petitions for reconsideration filed by WATCH and WCAI urging the Commission to afford such MVPDs the right to opt-out of any transition without undergoing to uncertainty and costs associated with a waiver process. Digital TV One is hardly alone in that regard – the proposals by WATCH and

² See Comments of Digital TV One, RM-10586 (filed Nov. 21, 2002); Comments of Digital TV One, WT Docket No. 03-66 (filed Oct. 23, 2003). See also “First Supplement to ‘A Proposal for Revising the MDS and ITFS Regulatory Regime,’” RM-1056 at 4-5 (filed Nov. 14, 2002) [“First Coalition Supplement”].

³ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14199 ¶ 77 (2004) [“*Report and Order*”].

WCAI to afford an automatic opt-out to those who provide an MVPD service utilizing digital transmissions on more than seven BRS and EBS channels enjoys near-unanimous support in this docket.⁴ Indeed, with the sole exception of IMWED, not one party to this proceeding has opposed the provision of an automatic opt-out right to MVPDs providing service on at least seven digitized BRS/EBS channels. That ratio speaks volumes – save for IMWED’s self-serving proposal, the remainder of the BRS/EBS industry clearly recognizes that equitable considerations weigh heavily in favor of affording an automatic opt-out right as proposed by WATCH and WCAI.

As a result, Digital TV One must strenuously object to IMWED’s suggestion that opt-outs only be permitted pursuant to an individualized waiver and that such waivers only be available to MVPDs operating in areas that “are very remote geographically, or separated from other populated areas by mountainous terrain.”⁵ Admittedly, allowing MVPDs to continue operating high-power services across the entire 2.5 GHz band raises the potential for interference neighboring cellular systems, although there is no

⁴ See, e.g., Consolidated Reply of Wireless Direct Broadcast System to Petition for Reconsideration, WT Docket No. 03-66, at 3 (filed Mar. 4, 2005); Consolidated Reply of C&W Enterprises, Inc. to Petition for Reconsideration, WT Docket No. 03-66, at 4 (filed Mar. 4, 2005); Consolidated Opposition to and Comments of BRS Rural Advocacy Group in Support of Petitions for Reconsideration, WT Docket No. 03-66, at 7-9 (filed Feb. 22, 2005); Petition of Consolidated Telecom, *et al.* for Reconsideration and Clarification, WT Docket No. 03-66, at 9-10 (filed Jan. 10, 2005); Petition of Central Texas Communications for Reconsideration, WT Docket No. 03-66, at 7-9 (filed Jan. 10, 2005); Consolidated Opposition of Sprint Corp. to Petitions for Reconsideration, WT Docket No. 03-66, at 9-10 (filed Feb. 22, 2005); Consolidated Opposition of Nextel Communications to Petitions for Reconsideration, WT Docket No. 03-66, at 20-21 (filed Feb. 22, 2005); Comments of the National Telecommunications Cooperative Ass’n in Support of Petitions for Reconsideration, WT Docket No. 03-66, at 2-4 (filed Feb. 22, 2005).

⁵ See IMWED Opposition at 17.

evidence in the record that the interference cannot be mitigated by careful design of the cellular system.⁶ Moreover, although never mentioned by IMWED, WCAI has proposed, that “while any licensees excused from the transition process as the result of an MVPD opt-out may continue to operate utilizing the current bandplan, those licensees should be required to participate in the transition planning process in good faith and to subsequently make such modifications to their facilities at the proponent’s expense as the proponent may reasonably request in an effort to reduce interference to the licensees in other markets that are transitioning.”⁷ WATCH has also advanced a similar proposal.⁸ Digital TV One certainly has no objection to the adoption of this proposal.

While the risk of interference from an MVPD opt-out cannot be entirely eliminated, the Commission must balance that risk against the equitable and public interest considerations supporting grant of the WATCH and WCAI proposals, including the material adverse effect that adoption of IMWED’s proposal would have on Digital TV One and the handful of other MVPDs that are utilizing more than seven BRS and EBS channels to transmit their service to subscribers. The WATCH Petition and the WCAI Petition clearly enunciate the substantial equitable and public service justifications for affording blanket relief to those providing MVPD service using more than seven digitally compressed channels.⁹ In the interest of brevity, the rationale for such relief need not

⁶ *Id.*

⁷ WCAI Petition at 30-31 (footnote omitted).

⁸ See WATCH Petition at 9-10.

⁹ See *id.* at 4-10; WCAI Petition at 26-30.

be repeated here. Suffice it to say that none of the justifications advanced by WATCH are mentioned, much less refuted, by IMWED.

At bottom, the issue before the Commission is one of equity. Like WATCH and the handful of other MVPDs who were offering digital service long before the Coalition Proposal was filed on October 7, 2002,¹⁰ Digital TV One had done exactly what the Commission once expected all licensees of BRS/EBS spectrum to do – it invested millions of dollars in capital to construct and operate the MVPD service that today provides thousands of customers access to a state-of-the-art digital video system and competes with the incumbent cable provider and Digital Broadcast Satellite providers in and around San Juan, PR. Given the competitive environment in which Digital TV One must operate, requiring Digital TV One to transition to the new bandplan will sound the death knell for its MVPD offering, since there simply is insufficient capacity within the Middle Band Segment (“MBS”) of the new bandplan to accommodate Digital TV One’s programming. Unlike those who are operating analog system and can relocate their entire current offerings to the MBS, Digital TV One has no viable option.

¹⁰ See “A Proposal For Revising The MDS And ITFS Regulatory Regime,” Wireless Communications Ass’n Int’l, Nat’l ITFS Ass’n and Catholic Television Network, RM-10586 at 10 (filed Oct. 7, 2002)[“Coalition Proposal”].

Thus, for the reasons set forth above, Digital TV One urges the Commission to modify the rules adopted in the *Report and Order* to allow any MVPD that was offering digital video service utilizing more than seven BRS or EBS channels as of October 7, 2002 the right to automatically opt-out of the transition process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michelle A. Bynum hereby certify that the foregoing Reply to Consolidated Opposition to Petitions for Reconsideration was served this 9th day of March, 2005 by depositing true copies thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

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